
COMMONWEALTH OF MASSACHUSETTS

The Appeals Court

SUFFOLK, SS.

No. 2018-P-0038

MASSACHUSETTS WINES & SPIRITS, LLC D/B/A TOTAL WINE & MORE,
Plaintiff-Appellee,

v.

ALCOHOLIC BEVERAGES CONTROL COMMISSION,
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE SUFFOLK SUPERIOR COURT

**BRIEF OF THE APPELLANT ALCOHOLIC BEVERAGES CONTROL
COMMISSION**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	3
QUESTION PRESENTED.....	6
STATEMENT OF THE CASE.....	6
I. NATURE OF THE CASE.....	6
II. COURSE OF PROCEEDINGS.....	7
III. STATEMENT OF FACTS.....	8
ARGUMENT.....	11
I. STANDARD OF REVIEW.....	11
II. THE COMMISSION’S INTERPRETATION OF 204 CMR § 2.04(1) IS REASONABLE.....	13
A. The Regulation Requires That Net Cost Appears On A Single Invoice, Which Is What The Commission Relied On Here.....	13
B. The Commissioner’s Regulation Reflects an Administrable Means of Effectuating the Statutory Policy of Enforcing Minimum Price Requirements.....	18
III. THE CQDS DID NOT REDUCE THE COST OF THE PURCHASED ALCOHOLIC BEVERAGES.....	23
IV. TOTAL WINE’S REMAINING ARGUMENTS ARE WITHOUT MERIT.....	26
A. The Commission Did Not Apply A New Interpretation of the Regulation.....	27
B. The Commission’s Interpretation of 204 CMR 2.04(1) Does Not Conflict With the Sherman Act.....	28
CONCLUSION.....	30
ADDENDUM.....	31

TABLE OF AUTHORITIES

Cases

Box Pond Ass’n v.
Energy Facilities Siting Bd.,
435 Mass. 408 (2001).....16

Burke v. Bd. of Appeal on
Motor Vehicle Liability
Policies & Bonds,
90 Mass. App. Ct. 203 (2016).....27

Canterbury Liquors & Pantry
v. Sullivan,
16 F. Supp. 2d 41
(D. Mass. 1998).....25, 28

Chin v. Marriot,
470 Mass. 527 (2015).....17

City of Worcester v.
Coll. Hill Properties, LLC,
465 Mass. 134 (2013).....14

Com v. Hourican,
85 Mass. App. Ct. 408 (2014).....17

Connecticut Fine Wine &
Spirits v. Harris,
255 F.Supp.3d 355
(D.Conn. 2017).....29

Dexter v. Superintendent,
Massachusetts Corr. Inst., Concord,
88 Mass. App. Ct. 325 (2015).....21

Flemings v. Contributory Retirement
Appeal Board,
431 Mass. 374 (2000).....12

Foxboro Harness, Inc. v.
State Racing Comm’n,
42 Mass. App. Ct. 82 (1997).....11

Goldberg v. Board of Health
of Granby,
444 Mass. 627 (2005).....12

<i>Greater Boston Television Corp. v. FCC,</i> 444 F.2d 841, (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971).....	20
<i>Howard Johnson Co. v. Alcoholic Beverages Control Comm’n,</i> 24 Mass. App. Ct. 487 (1987).....	19
<i>Johnson v. Martignetti,</i> 374 Mass. 784 (1978).....	20
<i>Langlitz v. Bd. of Registration of Chiropractors,</i> 396 Mass. 374 (1985).....	12
<i>Leegin Creative Leather Prods., Inc. v. PSKS, Inc.,</i> 551 U.S. 877 (2007).....	29
<i>Levy v. Bd. of Registration & Discipline in Med.,</i> 378 Mass. 519 (1979).....	20
<i>Massachusetts Coal. for the Homeless v. Sec’y of Exec. Office of Health & Human Servs.,</i> 422 Mass. 214 (1996).....	23
<i>Miller Brewing Co. v. Alcoholic Beverages Control Comm’n,</i> 56 Mass. App. Ct. 801 (2002).....	20
<i>Police De’t of Boston v. Kavaleski,</i> 463 Mass. 680 (2012).....	11
<i>Salvas v. Wal-Mart Stores, Inc.,</i> 452 Mass. 337 (2008).....	16
<i>Southern Worcester County Reg. Voc. School Dist. v. Labor Relations Comm’n,</i> 386 Mass. 414 (1982).....	13

<i>T.J. Hartnett Beverage Co. v.</i> <i>Alcoholic Beverages Control Comm’n,</i> 350 Mass. 619 (1966).....	19
<i>Van Munching Co. v.</i> <i>Alcoholic Beverages Control Comm’n,</i> 41 Mass. App. Ct. 308 (1996).....	25, 26

Statutes

G.L. 10, § 71.....	18
G.L. c. 30A, § 1(6).....	12
G.L. c. 30A, § 14.....	11
G.L. c. 30A, § 14(7).....	11, 12
G.L. c. 138.....	19
G.L. c. 138, § 1.....	28
G.L. c. 138, § 15.....	8, 20
G.L. c. 138, § 23.....	17, 18
G.L. c. 138, § 24.....	19
G.L. c. 138, § 25A.....	25, 28, 29
G.L. c. 138, § 25C.....	13, 19, 28, 29
G.L. c. 138, § 25C(f).....	15, 19
G.L. c. 138, § 25C(g).....	19

Rules and Regulations

204 CMR § 2.02.....	13, 15, 16, 21
204 CMR § 2.04(1).....	Passim
204 CMR § 2.05(3).....	16
204 CMR § 6.04(5)(a).....	25

QUESTION PRESENTED

204 C.M.R. § 2.04(1) prohibits the sale of alcoholic beverages at a price less than the "net cost appearing on the invoice for said beverage." The Alcoholic Beverages Control Commission ("Commission") suspended Total Wine's alcohol license in two stores after finding that it sold alcoholic beverages below the net cost that appeared on the invoice that was issued by the wholesaler at the time of purchase. The question presented is whether the Superior Court erred in allowing Total Wine's motion for judgment on the pleadings, rejecting the Commission's interpretation of 204 C.M.R. § 2.04(1), and holding that the Commission should have taken into account a Cumulative Quantity Discount, where that "discount" did not appear on the original invoice and was actually a credit toward future purchases?

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This is an appeal from a judgment of the Suffolk Superior Court granting Total Wine's motion for judgment on the pleadings, and denying the Commission's motion for judgment on the pleadings.

II. COURSE OF PROCEEDINGS

In late 2015, the Commission received reports that Massachusetts Wines & Spirits, LLC d/b/a Total Wine & More ("Total Wine"), was selling alcoholic beverages at prices below the "invoiced cost" in violation of 204 C.M.R. § 2.04(1) (RA1 85).¹ The Commission investigated the complaints and made preliminary findings of violations (RA1 258-260, 400-402, RA2 76-78). Following three adjudicatory hearings, all held on January 18, 2017, the Commission found that Total Wine sold alcoholic beverages at less than the invoiced price, in violation of 204 C.M.R. § 2.04(1), and suspended the license of the Natick store for eleven days and the Everett store for eight days (RA1 21, 30, 40).

On January 31, 2017, Total Wine filed a Complaint in Suffolk Superior Court, seeking, *inter alia*, a stay of the Commission's order, and that the decision of the Commission be set aside or remanded (RA1 5, 20). Total Wine's motion to stay was allowed on February 8, 2017 (RA1 5).

¹ The three-volume record appendix will be referred to as RA1, RA2, and RA3.

On May 18, 2017, Total Wine filed a motion for judgment on the pleadings, which was accompanied by the Commission's cross-motion and opposition (RA1 5). Following a hearing, on July 25, 2017, Total Wine's motion was allowed, and the Commission's motion was denied (RA1 6, Gordon, J.).

Judgment entered on July 27, 2017, and the Commission timely appealed (RA1 6).

III. STATEMENT OF FACTS

Total Wine is a national alcoholic beverage retailer which operates two retail liquor stores, in Natick and Everett, pursuant to a license to sell alcoholic beverages off the premises under G.L. c. 138, § 15 (RA1 11-13).

The violations at issue involved the sale of alcoholic beverages purchased from two wholesalers - Martignetti Companies and Horizon Beverage Company (RA1 85). The Commission's Investigators reported that from November 1, 2015 to December 31, 2015, and from May 11, 2016 to June 30, 2016, the Natick store sold several alcohol products at prices less than the cost displayed on the invoice issued by the wholesaler to the retailer (RA1 258-260; 400-402). The same practice occurred at the Everett Store from May 1, 2016 to June

30, 2016 (RA2 76-78). The invoices received upon purchase of the beverages reflected the price paid by Total Wine to the wholesaler at the time of delivery, including a prompt payment discount of one percent (RA1 27, 136, 293).

In all three cases, Total Wine later received credits known as Cumulative Quantity Discounts ("CQDs") for having purchased a sufficient volume of each product (RA1 126-127). Although Total Wine qualified for the credit when it priced the individual bottles for retail, the documentation of the credits was received only *after* Total Wine made the applicable beverages available for sale (*Id.*). Indeed, at the time that the Investigators issued their original reports, Total Wine could not provide an invoice reflecting the CQDs for either of the violations in 2016 (RA1 402, RA2 78). Even when such documentation finally issued, some of the credit statements were not in the same form as invoices issued at the time of purchase from the wholesaler, and they did not list the cost of the product (RA1 269, 392).²

² For example, a Horizon "credit adjustment" listed the total credit for each product in bulk, but did not provide the credit per bottle or the adjusted price per bottle (RA1 269).

The awarding of a CQD did not result in Total Wine paying less for the beverages that were the subject of the inspection; instead, it received a credit for future purchases (RA1 177, 230). Nevertheless, Total Wine priced its alcoholic beverages as if the CQDs were a discount on that very purchase, and as if pro-rated CQD amounts appeared in the actual invoice (RA1 140-141). The Chief Investigator agreed that if the quantity discount had been actually included in the delivery invoice, there would be no dispute (RA1 228).

Following a hearing, the Commission found that Total Wines was in violation of 204 CMR § 2.04(1). In particular, the Commission interpreted "invoiced cost" to be the actual cost to the retailer, as printed on the invoice issued at the time of purchase (RA1 88, 97, 106). Since the alcoholic beverages were sold at a price below the cost that appeared on the invoice, Total Wines was in violation of the regulation (RA1 84-89, 93-98, 102-107).

The Commission imposed an 11-day suspension at the Natick store, with 3 days to be served, and 8 days in abeyance, and an 8-day suspension for the Everett

store, with 2 days to be served, and 6 days in abeyance (RA1 82-98).

ARGUMENT

I. STANDARD OF REVIEW

This administrative appeal is governed by the provisions of G.L. c. 30A, § 14. As such, the Commission's decision may be modified or set aside only if the Court "determines that the substantial rights of [a] party may have been prejudiced" because the decision is in excess of the statutory authority of the agency, based upon an error of law, unsupported by substantial evidence, arbitrary or capricious, or an abuse of discretion. G.L. c. 30A, § 14(7). Review is confined to the administrative record, and the burden rests with Total Wine to overcome the presumption that the Commission's decision is valid. See *Foxboro Harness, Inc. v. State Racing Comm'n*, 42 Mass. App. Ct. 82, 85-86 (1997); see also *Police Dep't of Boston v. Kavaleski*, 463 Mass. 680, 689 (2012) (party challenging agency decision bears a "heavy burden") (citations omitted).

In evaluating Total Wine's claim, this Court is required to "give due weight to the agency's experience, technical competence, specialized

knowledge, and the discretionary authority conferred upon it." G.L. c. 30A, § 14(7); see also *Flemings v. Contributory Retirement Appeal Bd.*, 431 Mass. 374, 375 (2000) (deferring to agency's reasonable interpretation of statute it is charged with enforcing). In particular, the Commission's interpretation of its own enabling statute and jurisdiction is entitled to great deference. See e.g. *Goldberg v. Board of Health of Granby*, 444 Mass. 627 (2005) (a "State Administrative Agency in Massachusetts has considerable leeway in interpreting a statute it is charged with enforcing . . .").

The Court's function is to consider the entire record and sustain the Commission's decision unless it is premised on an error of law or is unsupported by substantial evidence. *Langlitz v. Bd. of Registration of Chiropractors*, 396 Mass. 374, 379 (1985).

"'Substantial evidence' means such evidence as a reasonable mind might accept as adequate to support a conclusion," after taking into consideration opposing evidence in the record. See G.L. c. 30A, §§ 1(6) and 14(7). This Court cannot substitute its assessment of the evidence for that of the agency, even if "the court would justifiably have made a different choice

had the matter been before it de novo." *Southern Worcester County Reg. Voc. School Dist. v. Labor Relations Comm'n*, 386 Mass. 414, 420 (1982).

In this case, as is discussed below, the Commission's decision is free from errors of law, and it is neither arbitrary and capricious nor an abuse of discretion.

II. THE COMMISSION'S INTERPRETATION OF 204 CMR § 2.04(1) IS REASONABLE.

The Commission correctly interpreted 204 CMR § 2.04(1) as requiring any discount to appear on the invoice provided upon delivery rather than in multiple documents. This is because the regulation stated that the cost of an alcoholic beverage be determined by the net cost appearing on "the invoice." Moreover, 204 CMR § 2.02 required that every invoice accurately state the true price of the listed alcoholic beverages, including any discount. These provisions are part of a regulatory scheme to practically enforce the minimum price rule set out in G.L. c. 138, § 25C.

A. The Regulation Requires That Net Cost Appears On A Single Invoice, Which Is What The Commission Relied On Here.

This case turns on the interpretation of 204 CMR § 2.04(1). In short, that regulation prohibits selling

alcoholic beverages at a cost less than their
"invoiced cost":

No holder of a license issued under M.G.L.
c. 138, § 15 shall sell or offer to sell
any alcoholic beverages at a price less
than invoiced cost. Cost is defined as net
cost appearing on the invoice for said
alcoholic beverage. The use of any device,
promotion or scheme which results in the
sale of alcoholic beverages at less than
invoiced cost is prohibited.

In other words, under the regulation, the permissible
minimum price of an alcoholic beverage is determined
by its "invoiced cost," which is further defined as
"net cost appearing on the invoice for said alcoholic
beverage." 204 CMR § 2.04(1).

Consistent with the regulation's definition of
"cost" as "net cost appearing on the invoice for said
alcoholic beverage," the Commission here held that the
"invoiced cost" is determined by the cost printed on
the invoice that was issued by the distributor at the
time of purchase (RA1 88).

This interpretation applies the plain and
ordinary meaning of the language in the regulation.
City of Worcester v. Coll. Hill Properties, LLC, 465
Mass. 134, 138-39 (2013) (words of a statute are given
their plain and ordinary meaning). In particular, the
regulation refers to a single invoice - "the invoice"

- not multiple documents or contracts. 204 CMR
§ 2.04(1).

The Commission's interpretation is also consistent with the overall regulatory scheme to efficiently monitor compliance with the minimum price rule set out in G.L. c. 138, § 25C(f) (prohibiting sale of alcoholic beverages at less than the scheduled minimum consumer resale price). A component of this scheme is a requirement that every invoice accurately reflect the price of the beverage, *including any discount*:

nor shall any invoice given or accepted by any licensee contain any statement which falsely indicates prices, discounts, or terms of sale; nor shall there be inserted in any invoice given or accepted by any licensee any statement which makes the invoice a false record, wholly or in part, of the transaction represented therein; *nor shall there be withheld from any invoice given or accepted by any licensee any statements which properly should be included therein, so that in the absence of such statements the invoice does not truly reflect the transaction involved.*

204 CMR § 2.02 (emphasis added).

For this reason, the Investigators were entitled to rely upon the purchase invoices to determine the "net cost" of the alcoholic beverages, including any

purported discount.³ See *Salvas v. Wal-Mart Stores, Inc.*, 452 Mass. 337, 358 (2008) (courts attach presumption of reliability to business records because businesses themselves rely on their accuracy).

Nevertheless, Total Wine concedes that the invoices on delivery "*did not* include all the terms of sale, as references to CQDs, a critical term of the sales, were absent" (RA2 305) (emphasis in original). To the extent that Total Wine claims that the CQDs were a "discount," the delivery invoices were in violation of 204 CMR § 2.02.

Rather than deferring to the Commission's interpretation of its own regulations, the lower court effectively ignored the regulation's requirement that the minimum price must be determined from the invoice. See *Box Pond Ass'n v. Energy Facilities Siting Bd.*, 435 Mass. 408, 416 (2001) ("An agency's interpretation of its own regulation and statutory mandate will be

³ 204 CMR § 2.05(3), requires that a retail invoice state "the names and addresses of the purchaser and seller, the date and the amount of the purchase, and also itemize[] the number of the various kinds of containers and the kinds, quantities and brands of alcoholic beverages or alcohol." That is the invoice that was produced to the Investigators who investigated these claims (RA1 261-263, 406-410, RA2 82-106).

disturbed only if the 'interpretation is patently wrong, unreasonable, arbitrary, whimsical, or capricious") (citations omitted). Instead, the lower court held that a retailer may sell alcoholic beverages at the "net cost," regardless of how it is documented (RA3 118). In so doing, the lower court did not follow the fundamental canon of statutory construction that every word of a provision must be taken into account, and that each clause or phrase in a provision is to be construed with reference to every other clause or phrase without giving undue emphasis to any one group of words. *Chin v. Merriot*, 470 Mass. 527, 537 (2015) ("we give effect to all words of a statute, assuming none to be superfluous"); see also *Com. v. Hourican*, 85 Mass. App. Ct. 408, 410 (2014) ("we interpret a regulation in the same manner as a statute"). In particular, the Superior Court's interpretation of the regulation focused *solely* on the term "net cost," completely ignoring the rest of the sentence: "net cost *appearing on the invoice for said alcoholic beverage.*" 204 CMR § 2.04(1) (emphasis added).

The lower court's reliance upon the use of "invoiced cost" in G.L. c. 138, § 23, as controlling

is also misplaced (RA3 120). In that provision - which concerns the calculation of an offer in compromise in lieu of license suspension - such calculations are based, in part, on the "invoiced cost" of goods sold per diem. However, the term "invoiced cost" is not defined in § 23, nor does a definition appear anywhere else in G.L. c. 138. The Commission was free to promulgate a regulation unrelated to § 23 using the term "invoiced cost" and specifically defining "cost" by reference to "the invoice" for the beverage in creating a workable means of enforcing the permissible minimum price.

Total Wine was found to be in violation of the minimum price regulation because it sold alcoholic beverages at a price below the "net cost" as it appeared on the invoices that must be supplied at the time of delivery. Simply put, the Commission's decision faithfully applies the plain meaning of its own regulations and should therefore be upheld.

B. The Commissioner's Regulation Reflects an Administrable Means of Effectuating the Statutory Policy of Enforcing Minimum Price Requirements.

The Commission has been entrusted with the "general supervision of the conduct of business of ... selling alcoholic beverages." G.L. c. 10 § 71. See

Howard Johnson Co. v. Alcoholic Beverages Control Comm'n, 24 Mass. App. Ct. 487, 489 (1987). The Commission also has "comprehensive powers of supervision of licensees." *Id.* That supervisory power encompasses the enforcement of the statutory scheme that establishes minimum prices for alcoholic beverages. See G.L. c. 138, § 25C(f) (prohibiting sale of alcoholic beverages at less than the scheduled minimum consumer resale price); *T. J. Hartnett Beverage Co. v. Alcoholic Beverages Control Comm'n*, 350 Mass. 619, 622 (1966) (Section 25C sets up a procedure for establishing minimum consumer resale prices). Section 25C also empowers the Commission to promulgate regulations to prevent the retail sale to consumers of alcohol below the minimum price by "giving any rebate, allowance, free goods, discount, or any other thing or service of value." G.L. c. 138, § 25C(g).

In addition, G.L. c. 138, § 24, gives the Commission broad authority to adopt regulations "for clarifying, carrying out, enforcing and preventing violations of, all and any of [c. 138's] provisions for inspection of the premises and method of carrying

on the business of any licensee ... [and] for the proper and orderly conduct of the licensed business."

This broad statutory mandate endows the Commission with "a wide range of discretion in establishing the parameters of its authority pursuant to the enabling legislation," and that discretion "is particularly broad when an agency is concerned with fashioning remedies and setting enforcement policy." *Levy v. Bd. of Registration & Discipline in Med.*, 378 Mass. 519, 525 (1979), quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 857 (D.C.Cir. 1970), cert. denied, 403 U.S. 923 (1971).

In promulgating provisions such as 204 CMR § 2.04(1), the Commission was enforcing a statutory policy that was concerned not only with predatory pricing - the sole purpose identified by the Superior Court, see RA3 116 - but also with "the danger of liquor sales stimulations," which detract from the "promotion of temperance." *Johnson v. Martignetti*, 374 Mass. 784, 792 (1978) (affirming constitutionality of G.L. c. 183, § 15). See also *Miller Brewing Co. v. Alcoholic Beverages Control Comm'n*, 56 Mass. App. Ct. 801, 807, 811 (2002) (observing that provisions of c.

138 enacted to foster temperance and preserve public peace and order).

In effectuating the dual goals of c. 138, it was reasonable for the Commission to promulgate regulations that were administrable as a practical matter and also took into account the limited resources available for enforcement. *See Dexter v. Superintendent, Massachusetts Corr. Inst., Concord*, 88 Mass. App. Ct. 325, 329 & n. 6 (2015) (holding that reasonable interpretation of regulation may be based upon practical administrative considerations).

Relying upon the invoices issued at the time of sale to determine the "net cost" has the benefit of efficiency, consistency, and simplicity. Moreover, as stated above, the Investigators were entitled to rely upon the accuracy of the purchase invoices, as they were required to include any discount. *See* 204 CMR § 2.02.

By contrast, the Superior Court's preferred rule would be far less efficient and practical for Investigators, who could not rely on "the" invoice sent with a particular delivery, but also would be required to inspect any other paper documents that might reflect a "discount" or credit. Such discounts

or credits may not even have yet actually been issued by the wholesaler - as occurred here (RA1 402, RA2 78). And the Investigator might also have to perform the Investigator's own calculations of the per-unit "net price," if, as was the case here, the documents ultimately issued by the wholesaler did not reflect such an amount. See RA1 269.

While it is true that in some circumstances, depending on how a wholesaler chooses to structure its discounts and issue its invoices, a retailer may not be permitted to sell alcoholic beverages at actual net cost under the current regulation, that does not render the regulation, or the Commissioner's interpretation of the statute and regulation, unreasonable or arbitrary. That is because it is not the goal of the statutory scheme to ensure the sale of alcoholic beverages at the lowest permissible price, but rather to prevent the sale of alcoholic beverages *below* the scheduled price.

Thus, contrary to the Superior Court's assertion that a requirement that discounts appear on the invoice at the time of delivery "bears no relationship" to the minimum price rule, and that it therefore lacked a rational explanation (RA3 116), the

enforcement regulations were designed to provide accurate information about the "net cost" of alcoholic beverages, including discounts. The lower court therefore erred in requiring that the Commission take into account CQDs that did not appear on the original invoice. *See Massachusetts Coal. for the Homeless v. Sec'y of Exec. Office of Health & Human Servs.*, 422 Mass. 214, 222-23 (1996) ("[w]here the Legislature has not imposed specific restrictions on the reasonable methods by which an agency may carry out its mandate in the plain language of the agency's enabling statute, it is not appropriate for the courts to order the agency to follow specific methods for meeting the agency's mandate").

III. THE CQDS DID NOT REDUCE THE COST OF THE PURCHASED ALCOHOLIC BEVERAGES.

Quite apart from the Commission's reasonable interpretation of its regulation, the CQDs awarded to Total Wines were not, in fact, a discount on the price of the alcoholic beverages that are the subject of this case. Instead, they were a credit toward future purchases. For this reason, too, Total Wine was in violation of the minimum price regulation.

It is undisputed that Total Wine paid the full cost of the alcoholic beverages as that cost appeared

on the delivery invoices, taking into account the prompt payment discount (RA1 177). It is also undisputed that Total Wine "earned" CQDs based upon the quantity of alcoholic beverages that were purchased (RA1 141). However, despite their nomenclature as a "discount," the CQDs were, instead, a credit to be used toward future purchases (RA1 177). Contrary to the lower court's characterization, the issuance of a credit, rather than discounting the goods purchased, is not a matter of "semantics" (RA3 122). The CQDs did not lower the cost of the invoiced products (RA1 177).⁴

The CQD process used by the wholesalers in this case is analogous to gift vouchers provided as an incentive to purchase additional products. In those cases, too, the purchaser does not receive a discount

⁴ During the hearings (RA1 177), a Commissioner sought clarification about the CQDs from Travis Smith, Total Wine's Vice President of Market Management and Supply Chain:

Commissioner 1: OK. So then the [CQD] - this would be issued - uh, a check would be issued to ...

Smith: Uh...

Commissioner 1: Or would it be a credit towards your next purchase?

Smith: Uh, a credit towards our next purchase.

on the goods purchased. Instead, the voucher can be used as partial or full payment for future purchases, which are also not discounted. Thus, the price that appeared on the invoices received by Total Wine was the actual "net cost" of the beverages. The fact that the contract provided for a credit on future purchases did not change the invoice price of the goods at issue in this case. Nor did it change the invoice price of future purchases.

The Superior Court also incorrectly relied upon the language of an invalidated regulation to construe 204 CMR § 2.04(1). In *Canterbury Liquors & Pantry v. Sullivan*, 16 F. Supp. 2d 41 (D. Mass. 1998), the U.S. District Court for the District of Massachusetts invalidated G.L. c. 138, § 25A (in its former iteration), and all regulations promulgated under it, including 204 CMR § 6.04(5)(a), which permitted a retailer to accumulate its total purchases over time to obtain a quantity discount. Despite the fact that 204 CMR § 6.04(5)(a) was invalidated in 1998, the Superior Court held that the practice of cumulative volume-based discounting nevertheless remains a permissible practice under Massachusetts law, citing *Van Munching Co. v. Alcoholic Beverages Control*

Comm'n, 41 Mass. App. Ct. 308, 310 (1996), and that the Commission's ruling was in conflict with that practice. See RA3 13-14.

This reasoning is flawed for three reasons. First, had the Commission elected to continue to allow retail prices to be reduced based upon such a program without the net cost appearing on the invoice, it could have promulgated new regulations to such effect, yet it chose not to do so. Second, the *Van Munching* decision did not authorize cumulative volume-based discounting by a wholesaler. Instead, it authorized volume discounting by a *supplier* based on the number of cases a wholesaler sold to a retailer in a *single delivery*. *Van Munching*, 41 Mass. App. Ct. at 308. Third, as described above, the "discount" at issue in this case is not the equivalent of a cumulative discount on the actual alcoholic beverages purchased, but rather a credit on future purchases. The regulation must therefore be enforced in its current, lawful iteration.

IV. TOTAL WINE'S REMAINING ARGUMENTS ARE WITHOUT MERIT.

Several additional claims raised by Total Wine in its motion for judgment on the pleadings were either

rejected by the lower court, or not addressed. None supports the judgment below.

A. The Commission Did Not Apply A New Interpretation of the Regulation.

Total Wine argued below that the Commission's ruling should not be applied retroactively because the Commission was acting by adjudication rather than rulemaking. But the requirements for accurate invoicing and pricing are stated in plain language in the regulations, *see supra* Part II.a, and there was no "prior interpretation" from which the Commission departed. *Burke v. Bd. of Appeal on Motor Vehicle Liab. Policies & Bonds*, 90 Mass. App. Ct. 203, 209 (2016) (agency was obligated to apply the statute as it was in effect).

The mere fact that the Commission had not previously discovered similar violations committed by retailers does not mean that the Commission created a new rule via adjudication or otherwise acted unfairly. Supposed surprise at the Commission's enforcing its own regulations is not a basis for overturning the Commission's decision.

B. The Commission's Interpretation of 204 CMR 2.04(1) Does Not Conflict With the Sherman Act.

The lower court acknowledged that Total Wine also attacked the Commission's decision on antitrust grounds, but did not reach the issue. See RA3 125 & n.15. Even if it had, this argument would not be a basis for affirmance, because the minimum price scheme contained in G.L. c. 138, § 25C, and enforced by 204 CMR 2.04(1), does not run afoul of antitrust concerns.

Federal courts have already rejected precisely this argument both in Massachusetts and elsewhere. In *Canterbury Liquors & Pantry v. Sullivan*, 16 F. Supp. 2d 41 (D. Mass. 1998), the court invalidated G.L. c. 138, § 25A - which precluded wholesalers from charging prices different from a quoted price for at least thirty days following the price quotation - for violating the Sherman Act. The court relied on then existing Supreme Court precedent standing for the proposition that, where "announced prices are coupled with a requirement that those prices be adhered to for a period of time, a *per se* violation of § 1 exists," because it is "a form of price fixing." *Id.* at 47. However, in so holding, the court expressly acknowledged that § 25C, the statute at issue here,

did not have the same structural defect as § 25A, because § 25C, unlike § 25A, comprised part of a system in which the Commission has authority to regulate such prices as “‘not being excessive, inadequate or unfairly discriminatory’” before those consumer prices can go into effect.” *Id.* at 50-51 (quoting G.L. c. 138, § 25C). In other words, the statutory regime did not simply consist of a system of price fixing by wholesalers, but instead a valid system of state regulation and supervision. *See id.*

More recently, a similar antitrust challenge brought by Total Wine to a minimum price scheme in Connecticut was also rejected. *See Connecticut Fine Wine & Spirits, LLC v. Harris*, 255 F.Supp.3d 355, 373-378 (D.Conn. 2017) (holding that *Leegin Creative Leather Prods., Inc. v. PSKS Inc.* 551 U.S. 877 (2007) overruled previous cases requiring a *per se* analysis of alcohol price maintenance and minimum price schemes) (appeal pending).

Because the Commission’s single invoice requirement applies uniformly to all wholesalers and retailers, and effectuates the previously enumerated valid state purposes of c. 183, *see supra* at 16-18, it

does not constitute an improper price-fixing scheme under the Sherman Act.

CONCLUSION

For the foregoing reasons, the Commission requests that the Court reverse the decision below and uphold the decision of the Commission.

Respectfully submitted,
ALCOHOLIC BEVERAGES CONTROL
COMMISSION,
By its attorney,

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Date: June 12, 2018

CERTIFICATION PURSUANT TO MASS. R. APP. P. 16(K)

I, Samuel Furgang, Assistant Attorney General, hereby certify that the foregoing brief complies with all the rules of court that pertain to the filing of briefs, including, but not limited to, the requirements imposed by Rules 16 and 20 of the Massachusetts Rules of Appellate Procedures.

/s/ Samuel M. Furgang

Samuel M. Furgang,
Assistant Attorney General
BBO# 559062

Date: June 12, 2018

ADDENDUM

TABLE OF CONTENTS

Memorandum of Decision and Order, on Cross-Motions for Judgment on the Pleadings, Suffolk Superior Court, Civil Action No. 2017-00312-C, Gordon, J., dated July 24, 2017.....	32
Mass. St. 138, § 25C.....	48
204 C.M.R. § 2.02.....	51
204 C.M.R. § 2.04.....	52
204 C.M.R. § 2.05.....	53

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

**SUPERIOR COURT
CIVIL ACTION
NO. 2017-00312-C**

MASSACHUSETTS FINE WINES & SPIRITS, LLC¹

vs.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

**MEMORANDUM OF DECISION AND ORDER ON
CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS**

This is an action for judicial review, pursuant to G.L. c. 30A, § 14, of a decision of the Alcoholic Beverages Control Commission (“ABCC” or the “Commission”) finding that the plaintiff, Massachusetts Fine Wines and Spirits, LLC d/b/a Total Wine & More (“Total Wine”), sold certain alcoholic beverage products at a retail price below their “invoiced cost” in violation of 204 Code Mass. Regs. § 2.04(1). The matter is before the Court on the parties’ Cross-Motions for Judgment on the Pleadings. For the reasons set forth below, the Commission’s motion is **DENIED** and Total Wine’s motion is **ALLOWED**.

BACKGROUND

The material facts revealed in the administrative record are largely undisputed, and are as follows.

Total Wine is a national alcoholic beverage retailer, and the holder of a retail license for the sale of alcoholic beverages to be consumed off of the premises under G.L. c. 138, § 15. This case concerns two of Total Wine’s Massachusetts stores, which are located in Natick and Everett.

Total Wine purchases alcoholic beverage products for its Natick and Everett stores from

¹d/b/a Total Wine & More

wholesalers Horizon Beverage Company (“Horizon”) and Martignetti Companies (“Martignetti”). Horizon and Martignetti offer merchant customers like Total Wine a 1% discount for prompt payment (the “prompt payment discount”), and additional discounts based on the total quantity of a particular product purchased during a specified period of time (commonly referred to as the “promotional period”). The latter is known in industry parlance as a cumulative quantity discount (“CQD”), and the nature of this discount and its impact on downstream retail pricing lie at the heart of the present dispute.

When wholesalers like Horizon and Martignetti deliver alcoholic beverage products to retailers, Commission regulations require them to “carry an invoice or sales slip, stating the names and addresses of the purchaser and seller, the date and the amount of the purchase, and also itemizing the number of the various kinds of containers and the kinds, quantities and brands of alcoholic beverages or alcohol.” 204 Code Mass. Regs. § 2.05(3). Horizon’s and Martignetti’s delivery personnel typically present these invoices (hereinafter, the “original invoice”) to Total Wine at the time of product delivery. The wholesalers’ original invoices state that a 1% prompt payment discount applies to the product order if the invoice is paid in full within 10 days. These original invoices are silent, however, as to the CQD. Total Wine’s policy is to pay the total cost stated on the original invoice in full, less the 1% prompt payment discount, at the time of delivery.

During the CQD promotional period for a product, participating retailers purchase all quantities of the product from wholesalers at its original price. At the end of a promotional period, however, wholesalers issue “credit invoices” that identify a dollar amount equivalent to the difference between the original price of the purchased product and the original price reduced

by the amount of the CQD that the retailer earned during such period. This amount is then multiplied by the quantity of the product that the retailer purchased during the promotional period, and the resulting amount is reflected as a negative balance which is then credited back to the retailer.² The record reflects that Martignetti and Horizon ordinarily apply the negative balance identified on Total Wine's credit invoices to the retailer's succeeding wholesale purchase.³

After it receives a wholesale delivery, Total Wine determines the retail price for which it will sell each product. Total Wine's first step in this process is to calculate the cost of the product by subtracting all of the discounts (of whatever nature) it has earned from the total price reflected on the original invoice. Because Total Wine always pays its wholesalers at the time of delivery, one of the discounts it offsets is the 1% prompt payment discount. If Total Wine has earned any CQDs on the product as of the time that it calculates its cost, Total Wine additionally subtracts the CQD amount from the original invoice. Total Wine then sets a retail price for the product that is higher than the product's true cost so computed.

Although Martignetti and Horizon do not issue credit invoices to Total Wine until a promotional period has ended, Total Wine maintains records that track the quantity of the products it purchases during such periods. Total Wine likewise maintains regular email contact with Martignetti and Horizon representatives. These representatives apprise Total Wine of any CQDs they have already earned and the quantity of a promoted product Total Wine still needs to

²Martignetti's credit invoices specifically identify the quantity of promotional products the retailer purchased during the promotional period, but Horizon's credit invoices do not.

³The record is ambiguous as to whether retailers may opt to receive a cash payment in lieu of the future purchase credit.

purchase to earn a corresponding CQD. The wholesaler representatives typically communicate this information to Total Wine while a promotional period is ongoing and before a credit invoice has issued.

In late 2015, the Commission received multiple complaints that Total Wine's Natick store was selling alcoholic beverages at prices below the "invoiced cost," in violation of 204 Code Mass. Regs. § 2.04(1). Section 2.04(1) provides, in relevant part, that alcoholic beverage retailers shall not:

"[s]ell or offer to sell any alcoholic beverages at a price less than invoiced cost. Cost is defined as net cost appearing on the invoice for said alcoholic beverage. The use of any device, promotion or scheme which results in the sale of alcoholic beverages at less than invoiced cost is prohibited."

In May and June of 2016, the Commission received additional complaints alleging that Total Wine's Natick and Everett stores were selling alcoholic beverages at prices below invoiced cost, in violation of Section 2.04(1). As a result of these charges, the Commission initiated three separate investigations of Total Wine's pricing practices (two addressed to the allegations against the Natick store, and one concerning the allegations against leveled against the Everett store). As part of these agency inquiries, investigator Rosemary Egan-Bailey ("Egan-Bailey") reviewed Total Wine's Horizon and Martignetti invoices, email correspondence between Total Wine, Horizon and Martignetti, and copies of Total Wine's product advertisements. Based on these documents, Egan-Bailey found that, in each instance reviewed, Total Wine had set its retail price based on a cost calculation that deducted CQDs from the total cost identified on the original product invoice – even though Total Wine had not yet received a documented credit invoice that reflected the CQD. Egan-Bailey concluded that this practice violated 204 Code Mass. Regs. §

2.04(1).

Based on Egan-Bailey's preliminary determinations, the Commission held three evidentiary hearings (one for each investigation) on December 7, 2016. During the hearings, Total Wine's Vice President of Market Management and Supply Chain, Travis Smith ("Smith"), testified about Total Wine's method for determining retail prices. Smith was clear that Total Wine does *not* include CQDs in its cost calculations before it has purchased the required quantity of the given product within the applicable promotion period.

The Commission issued decisions upholding Egan-Bailey's findings on January 18, 2017, concluding, in relevant part, as follows:

"[204 Code Mass. Regs. § 2.04(1)] does not speak to discounts earned or invoices relating back to original invoices. Instead, the regulation focuses on the 'invoiced cost' and the 'net cost appearing on the invoice.'

The Commission interprets 'invoiced cost' in the regulation to be the actual cost to the § 15 retailer of the alcoholic beverages as printed on the invoice issued by a supplier to the § 15 retailer at the time of purchase of the alcoholic beverages. It follows that any offers that do not appear on the invoice issued for the alcoholic beverages being purchased cannot be used in calculating the invoiced cost.

...
For all of the subject products . . . [Total Wine] sold the bottles at prices less than the costs appearing on the original invoices before the suppliers issued subsequent invoices reflecting credit adjustments."⁴

Based on these findings, the Commission suspended Total Wine's alcohol license for a period of eleven days, eight of which days were suspended for a period of two years provided there were no further violations.⁵ Total Wine's Chapter 30A appeal to this Court followed.

⁴Although the Commission issued three separate decisions, the cited passage appears in each one.

⁵The Commission has been enjoined by an order of preliminary injunction (Wilkins, J.) from enforcing the terms of this suspension pending the outcome of the present litigation.

DISCUSSION

I. Standard of Review

The party appealing an administrative decision bears the burden of demonstrating the decision's invalidity. Merisme v. Board of Appeals on Motor Vehicle Liab. Policies & Bonds, 27 Mass. App. Ct. 470, 474 (1989). In this connection, the Court is required to “give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as the discretionary authority conferred on it” by statute. G. L. c. 30A, § 14(7). The Court may not substitute its own judgment for that of the agency, nor may it disturb the agency's findings of fact if they are supported by record evidence. Guarino v. Director of Div. of Emp’t Sec., 393 Mass. 89, 92 (1984). The Court’s sole function “is to determine whether the [agency] applied correct legal principles in reaching its decision.” Id. A reviewing court may, however, reverse, remand or modify an agency decision if the “substantial rights of any party may have been prejudiced because the agency decision is based on an error of law or unlawful procedure; is arbitrary and capricious or unwarranted by facts found by the agency; or is unsupported by substantial evidence.” See G. L. c. 30A, § 14 (7).

II. Analysis

Total Wine argues that the Commission’s decision must be reversed because it has rendered a result that is arbitrary and capricious. See G. L. c. 30A, § 14 (7). A decision that is arbitrary and capricious is one that “lacks any rational explanation that reasonable persons might support.” Cambridge v. Civil Serv. Comm’n, 43 Mass. App. Ct. 300, 303 (1997). “Although the Commission is entitled to all rational presumptions in favor of its interpretation of its own [regulation], there must be a rational relation between its decision and the purpose of the

regulations it is charged with enforcing.” Fafard v. Conservation Comm’n, 41 Mass. App. Ct. 565, 572 (1996). The Court has reviewed the Commission’s decision in this case with the foregoing principles in mind, and concludes that ABCC’s construction of the term “invoiced cost” bears no relationship to the purpose of 204 Code Mass. Regs. § 2.04(1) and “lacks any rational explanation that reasonable persons might support.” See Cambridge, 43 Mass. App. Ct. at 303.

The Commission’s authority to promulgate regulations enforcing the laws that govern the Commonwealth’s alcoholic beverage industry is set forth in the Massachusetts Liquor Control Act, G.L. c. 138, § 24. See Commonwealth v. Mass. CRINC, 392 Mass. 79, 91 (1984).⁶ The Commission’s authority is statutorily limited, however, to the extent that such regulations cannot be inconsistent with the provisions of Chapter 138. See G.L. c. 138, § 24. The purpose of 204 Code Mass. Regs. § 2.04(1) must, therefore, be consistent with the provisions of G.L. c. 138 which pertain to the pricing of alcoholic beverage products.

With respect to the minimum price of alcoholic beverage products sold at the retail level, the case law is clear that the Legislature has consistently sought to block predatory practices such as “price cutting and ‘loss-leader selling’” in the industry. See Johnson v. Martignetti, 374 Mass. 784, 792 (1978) (alcohol regulation “aims at controlling the tendency toward concentration of power in the liquor industry; preventing monopolies; [and] avoiding practices such as indiscriminate price cutting”); T.J. Hartnett Beverage Co. v. Alcoholic Beverage Control Comm’n, 350 Mass. 619, 621 (1966) (similar); Bond Liquor Store, Inc. v. Alcoholic Beverage

⁶Chapter 138 encompasses the statutory provisions that govern the Commonwealth’s alcoholic beverage industry.

Control Comm'n, 336 Mass. 70, 71-72 (1957) (the Commission's power over prices under G.L. c. 138, § 25C "is an effective assurance against unfair competition and loss-leader selling . . . and in operation must put a full stop to price cutting as a competitive manoeuvre") (quotation omitted).⁷ This is, unmistakably, the animating purpose of Section 2.04(1), and the interpretation and enforcement of the regulation must be examined through this prism.⁸

The Commission's starchy construction of Section 2.04(1), which limits "invoiced cost" to the total reflected on a wholesaler's original invoice, bears no rational relationship to the legislative policy of prohibiting anti-competitive pricing practices. There was clearly no predatory pricing carried out in this case – only a salutary effort by a retailer to pass along savings derived from volume purchasing at the wholesale level to its customers. This is something the law should promote rather than punish. Low prices "benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition." State Oil v. Khan, 522 U.S. 3, 15 (1997); Whitehall Co. v. Merrimack Valley Distributing Co., 56 Mass. App. Ct. 853, 861 (2002) (lower aggregate prices enhance consumer welfare). Indeed, "cutting prices in order to increase business often is the very essence of

⁷In 1957, the Supreme Judicial Court held that G.L. c. § 23A, which sought to apply the Commonwealth's Unfair Sales Act to the alcoholic beverage industry, had been impliedly repealed by the enactment of G.L. c. 138, § 25C. See Bond Liquor Store, Inc., 336 Mass. at 74. The SJC reasoned that "the application of § 23A to sales to which § 25C also in terms applies would be so arbitrary and unreasonable . . . as to show inconsistency and repugnancy in their respective positions," and thus held that "the intention to occupy the entire field of price control in the liquor industry is reasonably manifested by § 25C." Id. at 74, 77. For this reason, Total Wine's insistence that the Unfair Sales Act, G.L. c. 93, § 14F, completely preempts 204 Code Mass. Regs. § 2.04(1) is unavailing.

⁸The Court does not credit the Commission's contention that Section 2.04(1) is to any meaningful degree designed to ensure that alcohol not be made overly available (through lower prices) to consumers.

competition.” *Id.* Accord Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 319 (2007) (“[T]he costs of erroneous findings of predatory -pricing liability were quite high . . . [and] chill the very conduct the antitrust laws are designed to protect.”) (citation omitted); A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1400 (7th Cir. 1989) (“A price ‘too low’ for an inefficient rival may be just right from consumers’ perspective, showing only that the defendant’s costs of production are lower than those of the plaintiff—for which it should receive a reward in the market rather than a penalty in the courthouse.”).⁹

Although the Commission did not take exception to plaintiff’s deducting prompt payment discounts from the total cost identified on the original invoice, its decision requires retailers to disregard other pricing information that is no less integral to a calculation of the *true* net cost of an alcoholic beverage product – a cost which might be higher or lower depending on factors such as applicable CQDs (as was the case with Total Wine) and/or whether the retailer was assessed additional fees for late payment. In doing so, the Commission failed to conduct a fair and accurate analysis of whether a retailer is, in actual fact, selling alcoholic beverage products below cost.¹⁰ The Commission’s disregard of the substantive realities of transactions between alcoholic

⁹Low retail prices for alcoholic beverage products are also essential to suppressing the criminal activity associated with illicit alcohol sales. See Report Made to His Excellency the Governor by a Special Commission Appointed by Him, 1933 MA H.B. 1300 at 11 (March 16, 1933) (“When the law provides . . . for an abundant supply of good and pure beverages at reasonable prices, there can be no legitimate demand for a supply through illicit dealers.”). See also Special Commission Established to Study the Laws and Regulations Governing the Alcoholic Beverage Industry in the Commonwealth of Massachusetts, Report to Governor Edward J. King at 1 (June 15, 1980) (“The consuming public deserves—not only the lowest possible price—but the widest possible choice among products, the most wholesome products available, and pricing which is fair and competitive [sic].”).

¹⁰To mitigate this result, the Commission has taken the position that CQDs may be factored into the “invoiced cost” of a product *after* a documentary credit invoice is issued to the

beverage wholesalers and their retail merchants renders its decision in this case arbitrary and capricious. See Hercules Chem. Co. v. Department of Env'tl. Protection, 76 Mass. App. Ct. 639, 643 (2010) (quoting Long v. Commissioner of Public Safety, 26 Mass. App. Ct. 61, 65 (1988)) (“Arbitrary and capricious action is that which is taken ‘without consideration and in disregard of facts and circumstances.’”).

Total Wine additionally argues that the Commission’s construction of 204 Code Mass. Regs. § 2.04(1) reflects an error of law. The Court agrees. “A properly promulgated regulation is to be construed in the same manner as a statute.” The Harvard Crimson, Inc. v. President & Fellows of Harvard College, 445 Mass. 745, 749 (2006) (quoting Hanlon v. Rollins, 286 Mass. 444, 447 (1934)). “Courts must ascertain the intent of a statute from all its parts and from the subject matter to which it relates, and must interpret the statute so as to render the legislation effective, consonant with reason and common sense.” Cote-Whitacre v. Department of Public Health, 446 Mass. 350, 358 (2006). Commission regulations must, therefore, “be construed,

retailer. Rather than prevent unfair competitive practices, however, this interpretation of Section 2.04(1) *creates* an opportunity for larger alcoholic beverage retailers to employ trade practices that will place smaller competitors at a market disadvantage. For example, a national retailer could predictably purchase a large up-front quantity of a particular product to qualify for a CQD, and then wait until it receives a corresponding credit invoice before placing the item on shelves for sale. In this way, the retailer would be able to entice potential customers by offering the product at the lowest possible price. By contrast, smaller retailers may not have the financial resources to purchase a large volume of products that will not immediately be placed in stores for sale. As a consequence, those retailers would be obliged to offer the product at a higher price than larger competitors that are able to afford to keep promoted products off of their shelves until they receive a credit invoice. Such an outcome – *viz.*, enabling large retailers to exploit their superior resources to drive smaller competitors out of the market – is the very antithesis of the level playing field Section 2.04(1) seeks to foster. See Johnson, 374 Mass. at 792 (Massachusetts alcohol regulation “aims at . . . preserving the right of small, independent liquor dealers to do business”).

where capable, so as to constitute a harmonious whole consistent with the legislative purpose” of G.L. c. 138. See id. (citation omitted). In the present case, the Commission has not only interpreted Section 2.04(1) so inflexibly as to produce a result with no rational connection to the purpose of its governing statutory scheme; it has given a meaning to “invoiced cost” that is troublingly inconsistent with the Legislature’s use of that term in another section of the Massachusetts Liquor Control Act. See People for the Ethical Treatment of Animals v. Department of Agricultural Resources, 477 Mass. 280, 286 (2017) (“Our primary duty is to interpret a statute in accordance with the intent of the Legislature.”) (quotation omitted).

General Laws c. 138, § 23 permits the Commission to accept “an offer in compromise” from alcohol licensees, viz., a fine, “in lieu of suspension of any license.” Section 23 requires the fine to be calculated as half of a licensee’s daily “gross profits” for each day that their license would otherwise be suspended. Section 23 further requires “gross profits” to be determined by the licensee’s total sales less the “invoiced cost” of the products sold each day. Applying the Commission’s construction of “invoiced cost” to Section 23, however, would impermissibly leave the calculation of a retailer’s gross profits to the caprice of their wholesalers. In particular, the gross profits of a retailer whose wholesaler decides to include the CQDs the retailer has earned on its original invoices will be calculated differently than the gross profits of a retailer whose wholesaler does not identify earned CQDs on its original invoices, and has not issued a credit invoice at the time gross profits are calculated. While the actual net cost of the particular products might be exactly the same for both retailers, their gross profits (and, for this reason, the total fine assessed under Section 23) would differ. Such inequitable treatment would present constitutional problems that the Court must presume the Legislature was aware of when it passed

St. 1973, c. 1009, and inserted the “fine in lieu of suspension” provision into G.L. c. 138, § 23. Cf. Harvey Payne, Inc. v. Slate Co., 345 Mass. 488, 493 (1963). General Laws c. 138, § 23 thus anticipates an interpretation of the term that takes factors extraneous to the original invoice into account. For this reason, the Commission’s cramped construction of “invoiced cost” is inconsistent with the meaning of that term as it is used elsewhere in the regulation’s governing statutory scheme.

The Commission’s attempt to justify its gloss on Section 2.04(1) by citing its authority to regulate minimum prices under G.L. c. 138, § 25C is unavailing. Section 25C prohibits the sale of alcoholic beverages until after the Commission has approved “minimum prices . . . as not being excessive, inadequate or unfairly discriminatory.” However, nothing in the Commission’s decision in this case suggests that Total Wine’s prices were below minimum prices approved under G.L. c. 138, § 25C. Rather, the Commission found that Total Wine’s prices were impermissibly low because they were based on a cost calculation that factored in CQDs before Total Wine had received corresponding credit invoices from its wholesaler(s). During Total Wine’s December 7, 2016 hearings before the Commission, and again during oral argument on the present motion, counsel for the Commission conceded that had the CQDs appeared on Total Wine’s original invoices, the prices at issue would not have violated Section 2.04(1). The Commission’s finding that Total Wine’s prices were impermissibly low (despite the fact that such prices did not fall below the products’ actual net cost or any minimum price established under § 25C), therefore, bears no rational relationship to the reason the Legislature granted the Commission authority to regulate minimum prices – namely, to prohibit unfair competitive tactics like predatory pricing. The putative problem under Section 2.04(1) identified by ABCC in

this case was simply the *sequencing* of the invoice paperwork, and *not* the substance of the product pricing itself. See Van Munching Co. v. Alcoholic Beverages Control Comm'n, 41 Mass. App. Ct. 308, 310 (1996) (examining Commission's authority in light of purpose of Legislature in granting such authority).¹¹

The Commission's semantic contention that CQDs do not reduce the "invoiced cost" of a product because they are "credits" and not discounts is likewise unpersuasive, in light of the Commission's contrary historical view of the CQD. In 1998, the U.S. District Court for the District of Massachusetts invalidated a portion of G.L. c. 138, § 25A that required wholesalers to adhere to posted prices for a specific period of time, based on its finding that the requirement was an unlawful restraint of trade. See Canterbury Liquors & Pantry v. Sullivan, 16 F. Supp.2d 41, 46 (D. Mass. 1998). At the same time, the Court invalidated all regulations promulgated under § 25A, which were codified at 204 Code Mass. Regs. §§ 6.00 et seq. In addition to prohibiting wholesalers from changing posted prices within the same calendar month, portions of the invalidated regulations governed discounting. See G.L. c. 138, § 25A(a); 204 Code Mass. Regs. § 6.04. One of the "discounts" identified in the invalidated regulations was the CQD. See 204 Code Mass. Regs. § 6.04(5)(a) ("[A] wholesaler may allow a retailer to accumulate his total purchases of items for purposes of obtaining a maximum quantity discount, provided that the wholesaler shall keep accurate records of all transactions resulting in the cumulative discount."). The invalidation of the regulation concerning discounts, which was inextricably intertwined with

¹¹It also bears noting that 204 Code Mass. Regs. § 2.04 does not cite G.L. c. 138, § 25C as the source of its regulatory authority. It cites, rather, to G.L. c. 138, § 12, which concerns entities that hold a license to serve beverages to be consumed on premises, and § 24, which speaks only to the Commission's authority to establish *maximum* prices.

requirements related to the unlawful price maintenance scheme struck down by the federal court, did *not* invalidate the approved practice of volume-based discounting in and of itself. See Van Munching Co., 41 Mass. App. Ct. at 310 (finding nothing in G.L. c. 138 prohibiting a discount program pursuant to which alcoholic beverage suppliers “provided increasing rebates” to wholesalers based on the number of cases sold in a single delivery to retailers). The Commission’s current effort to re-characterize CQDs as “credits,” therefore, represents an abrupt departure from its long-standing regulatory treatment of the CQD as a “discount,” and cannot be accepted.¹² “An agency should strive to act on bases that are uniform and predictable.” Hercules Chem. Co. v. Department of Env’tl. Protection, 76 Mass. App. Ct. 639, 643 (2010) (citation omitted). “If the agency has acted for reasons that are . . . related . . . to an ad hoc agenda, then that agency has acted arbitrarily because the basis for action is not uniform and, it follows, is not predictable.” Fafard, 41 Mass. App. Ct. at 568. Such appears to be the case here.¹³

¹²Assuming, arguendo, that a CQD is more properly categorized as a “credit” than a “discount,” the Commission’s position is unclear as to whether the application of such “credit” to a future original invoice may properly be considered when calculating that order’s “invoiced cost.”

¹³The Court recognizes that the Commission’s construction of Section 2.04(1) may have arisen out of the practical challenges it faces in enforcing a minimum price scheme. In other words, the burden on the Commission to investigate the “invoiced cost” of an alcoholic beverage product is arguably eased by limiting the “invoiced cost” to the total cost identified on the single originally invoiced document. Presently, Commission regulations prohibit retailers from accepting any invoices that “contain any statement which falsely indicates prices, discounts, or terms of sale; nor . . . any statement which makes the invoice a false record, wholly or in part, of the transaction represented therein; nor . . . any statements which properly should be included therein, so that in the absence of such statements the invoice does not truly reflect the transaction involved.” 204 Code Mass. Regs. § 2.02(2). The record, however, suggests that wholesalers’ original invoices in fact meet the requirements of this regulation with respect to CQDs by simply incorporating by reference the terms of the promotional pricing published in the Massachusetts Beverage Journal. In all events, the Commission is empowered to modify or add to its regulations – with prospective effect only – if a retailer’s incorporation of CQDs by reference

Although the Commission is entitled to all rational presumptions in favor of its interpretation of its own regulation, “there must be a rational relation between its decision and the purpose of the regulations it is charged with enforcing.” Fafard, 41 Mass. App. Ct. at 572. “The applicable principles are of judicial deference and restraint, not abdication.” Id. (citation omitted). In construing Section 2.04(1) as it now does, the Court *is* deferring to the Commission’s prerogative to establish regulations that serve a salutary policy under the Massachusetts Liquor Control Act -- viz., the prevention of anti-competitive, predatory pricing that ultimately harms consumers. See Whitehall Co., 56 Mass. App. Ct. at 861 (recognizing that unsustainably low prices “spawned by predation” are a “social harm”). The Court is likewise deferring to the agency’s insistence that the definition of “cost,” for purposes of the prohibition against below-cost selling at the retail level, be construed to require that the retailer’s cost of product be reflected in documentary invoices that correspond to the product purchased. What the Court cannot accept, however, is the additional, and arbitrary, requirement that each creditable cost be reflected in a single, original invoice that accompanies delivery of the product in real time. Such a requirement does nothing to further the statutory policy underlying Section 2.04(1), and in fact disadvantages the very small retailers this feature of the law aims to protect. See footnote 10, ante.¹⁴

inadequately apprises the agency of the discounts applicable to a determination of “invoiced cost.” See G.L. c. 138, § 24. This would be far more consistent with regulatory fairness than the novel construction of “invoiced cost” ABCC has imposed on Total Wine *post hoc* in the case at bar.

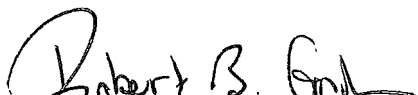
¹⁴To be sure, Total Wine is not the paradigmatic small retailer of which the Court speaks. But it is part of a regulated industry that has a right to expect that the statute which governs its business conduct will be construed by the enforcement agency in a manner that is predictable, fair, and consistent with the purposes of the law. That expectation has been frustrated in the

Based on the foregoing, the Court finds that the Commission has interpreted the definition of “invoiced cost” in a manner that is inconsistent with well-established principles of statutory construction, and has failed to articulate a rational connection between its construction of Section 2.04(1) and the underlying legislative purpose of the regulation.¹⁵ For these reasons, the Court concludes that the Commission’s decision was arbitrary and capricious, and may not stand. See G.L. c. 30A, § 14(7).

ORDER

In accordance with the foregoing, Total Wine’s Motion for Judgment on the Pleadings is **ALLOWED** and the Commission’s Motion for Judgment on the Pleadings is **DENIED**.

SO ORDERED.


Robert B. Gordon
Justice of the Superior Court

Dated: July 24, 2017

present case.

¹⁵Total Wine additionally argues that the Commission’s construction of 204 Code Mass. Regs. § 2.04(1) renders the regulation an unreasonable restraint on trade, in violation of the Sherman Antitrust Act, 15 U.S.C. § 1 et seq. However, inasmuch as the Court has found that the Commission’s construction and application of its regulation were impermissibly arbitrary and capricious, there is no need to engage in an analysis of whether such actions offend federal antitrust law.

§ 25C. Filing of schedule of minimum consumer prices;..., MA ST 138 § 25C

Massachusetts General Laws Annotated

Part I. Administration of the Government (Ch. 1-182)

Title XX. Public Safety and Good Order (Ch. 133-148a)

Chapter 138. Alcoholic Liquors (Refs & Annos)

M.G.L.A. 138 § 25C

§ 25C. Filing of schedule of minimum consumer prices; verification; filing and effective dates; inspection; rules and regulations

Currentness

(a) No brand of alcoholic beverages shall be sold within the commonwealth to a wholesaler or retailer, and no manufacturer, winegrower, farmer-brewer or wholesaler shall sell, offer for sale, solicit any order for, or advertise, any alcoholic beverages, the container of which bears a label stating the brand or the name of the owner or producer, unless a schedule of minimum consumer prices for each such brand of alcoholic beverages shall first have been filed with the commission and is then in effect.

(b) Each of the schedules hereinafter referred to shall be in writing, duly verified, and filed in the number of copies and form as required by the commission, and shall contain, with respect to each item, the exact brand or trade name, capacity of package, nature of contents, age and proof where stated on the label, the percentage and type of spirits where stated on the label, the minimum consumer resale price of a bottle and of a case, but not a multiple of a bottle price or a case price or a fraction of a case price, which prices shall be uniform throughout the commonwealth.

(c) Such schedule may be filed by (1) the manufacturer, winegrower, farmer-brewer, importer or wholesaler who owns such brand if licensed by the commission, or (2) any wholesaler, importer or manufacturer licensed by the commission, with the approval of the commission.

(d) The first schedule shall be filed on or before a date to be fixed by the commission, and the prices therein shall become effective on a date to be fixed by the commission and shall remain in effect for a period, not exceeding four months, to be fixed by the commission. Subsequent schedules shall be filed at the times and for the periods hereinafter set forth and shall be effective during the periods hereinafter set forth:--

FILING DATES.**EFFECTIVE DATES.**

July 1-10

September 1-October 31

September 1-10

November 1-December 31

November 1-10

January 1-February 28

§ 25C. Filing of schedule of minimum consumer prices;..., MA ST 138 § 25C

January 1-10

March 1-April 30

March 1-10

May 1-June 30

May 1-10

July 1-August 31

provided, however, that nothing contained herein shall require any manufacturer, winegrower, farmer-brewer or wholesaler to file a schedule of minimum consumer resale prices for any brand of alcoholic beverages offered for sale or sold (1) to a retailer under a brand which is owned exclusively by such retailer and sold within the commonwealth exclusively by such retailer; (2) to a church, synagogue or religious organization under a brand which is owned exclusively by such manufacturer, farmer-brewer, winegrower, or wholesaler, if authorized to sell wine or malt beverages to such persons and such wine or malt beverages are sold exclusively to such persons; (3) to on-premises retailers under a brand which is owned exclusively by such manufacturer, winegrower, farmer-brewer or wholesaler and is sold by such manufacturer, winegrower, farmer-brewer or wholesaler exclusively to such retailers for consumption on the premises.

No such filing, however, shall take effect unless within thirty days thereafter the commission shall approve such prices as not being excessive, inadequate, or unfairly discriminatory; provided, however, that such approval shall not be deemed a rule or regulation within the meaning of section twenty-four or section seventy-one, nor shall such approval be subject to the provisions of chapter thirty A.

(e) Within ten days after the filing of each such schedule the commission shall make it or a composite thereof available for inspection by licensees. All such schedules so filed shall be subject to public inspection from the time that they are required to be made available for inspection by licensees. Each manufacturer, winegrower, farmer-brewer and wholesaler shall retain in his licensed premises a copy of his filed schedules, and shall, as soon as practicable after the tenth day of the month in which such schedules are filed, compile, publish and mail to each retailer authorized to sell alcoholic beverages for off-premises consumption, a list, to be designated "minimum consumer resale price list". Such list, as then in effect, shall be conspicuously displayed within the interior of the licensed premises where sales are made and where they can be readily inspected by consumers.

(f) No licensee authorized to sell alcoholic beverages at retail for off-premises consumption shall sell, offer to sell, solicit an order for, or advertise, any alcoholic beverages at a price less than the minimum consumer resale price then in effect, unless written permission of the commission is granted for good cause shown and for reasons not inconsistent with the purposes of this section and under such terms and conditions as the commission deems necessary.

(g) The commission is hereby authorized to make rules which are necessary (1) to prevent circumvention of the provisions of this section by the offering or giving of any rebate, allowance, free goods, discount or any other thing or service of value; (2) to permit the withdrawal of, an addition to, a deletion from, or an amendment of any schedule containing the minimum consumer retail price or a modification of prices therein, when not inconsistent with the purposes of this section, whenever necessary to avoid practical difficulties or unnecessary hardships to any licensee affected by this section or because of acts or circumstances beyond the control of such licensee, and under such terms and conditions as are necessary to carry out the purposes of this section; (3) to permit the sale at a price less than the minimum consumer resale price of alcoholic beverages

§ 25C. Filing of schedule of minimum consumer prices;..., MA ST 138 § 25C

which are damaged or deteriorated in quality, or the closeout of a brand for the purpose of discontinuing its sale, under such terms and conditions as are necessary to carry out the purposes of this section; (4) to permit the sale by a retailer of a brand of alcoholic beverages for which a schedule of minimum consumer resale prices has not been and cannot be filed, whenever necessary to avoid practical difficulties or unnecessary hardships to any licensee affected by this section or because of acts or circumstances beyond the control of such licensee, and under such terms and conditions as are necessary to carry out the purposes of this section.

All schedules filed pursuant to this section shall be subject to public inspection from the time that they are required to be made available for inspection by licensees, and shall not be considered confidential. For the violation of any provision of this section or any rule or regulation duly promulgated under this section, the commission may suspend a license as follows:--for a first offence, not exceeding six days suspension of license; for a second offence, not exceeding fifteen days suspension of license; and for each subsequent offence, thirty days suspension of license. Each manufacturer, winegrower, farmer-brewer and wholesaler shall retain in his licensed premises for inspection by licensees a copy of his filed schedules as then in effect. The commission may make such rules and regulations as shall be appropriate to carry out the purposes of this section.

Credits

Added by St.1952, c. 385 as amended by St.1952, c. 567, § 1. Amended by St.1963, c. 258; St.1965, c. 428; St.1977, c. 929, § 10; St.1982, c. 627, § 9.

M.G.L.A. 138 § 25C, MA ST 138 § 25C

Current through Chapter 72 of the 2018 2nd Annual Session

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2.02: Price Lists, 204 MA ADC 2.02

Code of Massachusetts Regulations Currentness**Title 204: Alcoholic Beverages Control Commission****Chapter 2.00: Regulations of the Alcoholic Beverages Control Commission (Refs & Annos)****204 CMR 2.02****2.02: Price Lists**

(1) Hotels, Restaurants, Taverns and Clubs may keep posted in each room where any alcoholic beverages are sold a price list of such beverages. Wherever a price list is posted all sales of alcoholic beverages shall be made at the prices stated on the current posted price list.

(2) No licensee shall print, post, publish or use any false or fictitious price list; nor shall any invoice given or accepted by any licensee contain any statement which falsely indicates prices, discounts, or terms of sale; nor shall there be inserted in any invoice given or accepted by any licensee any statement which makes the invoice a false record, wholly or in part, of the transaction represented therein; nor shall there be withheld from any invoice given or accepted by any licensee any statements which properly should be included therein, so that in the absence of such statements the invoice does not truly reflect the transaction involved.

The Massachusetts Administrative Code titles are current through Register No. 1365, dated May 18, 2018

Mass. Regs. Code tit. 204, § 2.02, 204 MA ADC 2.02

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2.04: Sales, 204 MA ADC 2.04

Code of Massachusetts Regulations Currentness

Title 204: Alcoholic Beverages Control Commission

Chapter 2.00: Regulations of the Alcoholic Beverages Control Commission (Refs & Annos)

204 CMR 2.04

2.04: Sales

(1) No holder of a license issued under M.G.L. c. 138, § 15 shall sell or offer to sell any alcoholic beverages at a price less than invoiced cost. Cost is defined as net cost appearing on the invoice for said alcoholic beverage. The use of any device, promotion or scheme which results in the sale of alcoholic beverages at less than invoiced cost is prohibited.

(2) Donations of alcoholic beverages by licensees for the purpose of having the same used as prizes in any game of chance are prohibited.

(3) No licensee shall buy or sell, or offer or contract to buy or sell, any alcoholic beverages on consignment or under conditional sale or with the privilege of return or on any basis otherwise than a sale or purchase in good faith. 204 CMR 2.00 shall not prohibit the return, or acceptance of the return, of alcoholic beverages for ordinary and usual commercial reasons arising after the merchandise has been sold.

(4) No Hotel, Restaurant, Club, Tavern or “Package Goods” Store shall buy, or contract to buy, any alcoholic beverages from any Manufacturer or Wholesaler and Importer on consignment or under conditional sale or with the privilege of return or on any basis otherwise than a sale in good faith; provided, that 204 CMR 2.00 shall not prohibit the return of alcoholic beverages for ordinary and usual commercial reasons arising after the alcoholic beverages have been purchased.

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Mass. Regs. Code tit. 204, § 2.04, 204 MA ADC 2.04

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2.05: Licensed Premises, 204 MA ADC 2.05

Code of Massachusetts Regulations Currentness**Title 204: Alcoholic Beverages Control Commission****Chapter 2.00: Regulations of the Alcoholic Beverages Control Commission (Refs & Annos)****204 CMR 2.05****2.05: Licensed Premises**

(1) Slot machines or any other devices which furnish anything besides merchandise of a quantity and quality commensurate with the price deposited therein are prohibited on licensed premises. Gambling of any sort, except those games of chance authorized by the Legislature and/or local licensing authorities, shall not be permitted on any license premises.

(2) No licensee for the sale of alcoholic beverages shall permit any disorder, disturbance or illegality of any kind to take place in or on the licensed premises. The licensee shall be responsible therefor, whether present or not.

(3) The person in charge of any vehicle used for the delivery of alcoholic beverages or alcohol shall carry an invoice or sales slip, stating the names and addresses of the purchaser and seller, the date and the amount of the purchase, and also itemizing the number of the various kinds of containers and the kinds, quantities and brands of alcoholic beverages or alcohol.

(4) Manufacturers and Wholesalers and Importers, may sell and deliver alcoholic beverages to other licensees on any day except Sunday, the last Monday in May, Thanksgiving day or Christmas day or on the day following when Christmas day occurs on a Sunday.

(5) "Package Goods" Store licensees shall not permit any alcoholic beverages to be consumed on their licensed premises, except as authorized by M.G.L. c. 138, § 15.

(6) "Package Goods" Store licensees shall not sell alcoholic beverages, other than wines and malt beverages, in individual containers of over one gallon capacity.

(7) No Club licensed to sell alcoholic beverages shall use any signs, printed matter or other means publicly to advertise the sale of alcoholic beverages. This shall not prohibit the use of reasonable and proper signs relating to alcoholic beverages within the licensed premises.

(8) All premises covered by a license or storage permit shall be kept in a clean and sanitary condition at all times.

2.05: Licensed Premises, 204 MA ADC 2.05

No service of alcoholic beverages shall be made to any person in a Hotel, Restaurant, Tavern or Club in a glass or any other container which has not been thoroughly cleansed and properly sterilized prior to such service.

Hotels, Restaurants, Taverns and Clubs, licensed to sell alcoholic beverages, shall be provided with an adequate supply of running hot and cold water and soap and towels, at all times readily accessible, to thoroughly cleanse the hands of persons employed in such licensed premises.

All glasses, dishes, silverware and other utensils used in such licensed places for service of food or alcoholic beverages shall be thoroughly cleansed after service to each patron and subjected for at least five minutes to the germicidal action of clean water heated to and maintained at a minimum of 160°F.

Equally effective methods of germicidal action by the use of heat, hot water, steam or mechanical devices may be substituted.

After being cleansed and sterilized glasses, dishes, silverware and other utensils shall be packed or stored or arranged in such manner as not to become contaminated before again being used.

(9) Hotels, Restaurants, Taverns and Clubs shall have adequate and suitable toilet facilities which shall be conveniently located and properly lighted.

(10) Hotels, Restaurants, Clubs, Taverns, and "Package Goods" Stores shall keep their licensed premises adequately and properly lighted at all times in a manner satisfactory to the Licensing Authorities.

(11) All pipes, coils, hose, faucets and other appliances used in the drawing of draught beer shall be thoroughly cleansed and flushed at least twice in each week, and shall be kept in a clean and sanitary condition at all times.

The Massachusetts Administrative Code titles are current through Register No. 1365, dated May 18, 2018

Mass. Regs. Code tit. 204, § 2.05, 204 MA ADC 2.05

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COMMONWEALTH OF MASSACHUSETTS
MASSACHUSETTS APPEALS COURT

SUFFOLK, ss.

APPEALS COURT NO. 2018-P-0038

MASSACHUSETTS FINE WINES &
SPIRITS, LLC D/B/A TOTAL WINE &
MORE,

Plaintiff/Appellee

v.

ALCOHOLIC BEVERAGES CONTROL
COMMISSION,

Defendant/Appellant

CERTIFICATE OF SERVICE

I, Samuel Furgang, hereby certify under the pains and penalties of perjury, that a true copy of the Brief of the Alcoholic Beverages Control Commission was served June 12, 2018 by efilng, on counsel of record.

/s/ Samuel Furgang
Samuel Furgang
Assistant Attorney General